

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

THE HANOVER INSURANCE COMPANY, )  
Plaintiff-Counterclaim Defendant )  
v. ) Case No. 4:04CV00668RWS  
TMP INTERNATIONAL, INC., et al. )  
Defendant-Counterclaim Plaintiffs )

**DEFENDANT TONY TWIST'S MEMORANDUM IN OPPOSITION TO EMPLOYERS  
MUTUAL OF WAUSAU'S MOTION TO DISMISS COUNT II OF SECOND AMENDED  
COUNTERCLAIM, CROSS-CLAIM AND THIRD PARTY CLAIM OF TONY TWIST  
OR IN THE ALTERNATIVE FOR RECONSIDERATION OF THE ORDER OF  
JANUARY 24, 2006.**

Defendant Counterclaimant/Cross Claimant Tony Twist ("Twist") submits this Memorandum in Opposition to the Employers Mutual of Wausau (hereinafter "Wausau") Motion to Dismiss Count II of Tony Twist's Second Amended Counterclaim, Cross-Claim and Third Party Claim or in the alternative for reconsideration of Order of January 24, 2006.

**INTRODUCTION**

Wausau has moved to dismiss Count II of Twist's Second Amended Counterclaim, Cross-claims and Third Party Claim contending that Twist failed to state a claim upon which relief can be granted because, it argues the loss or damage upon which Twist recovered is not on account of bodily injury or death or damage to property under V.A.M.S. § 379.200. In addition Wausau argues that the Court previously decided the issue by its Order of January 24, 2006. Accordingly, Twist argues herein that the Court should reconsider its prior order granting the earlier motion to dismiss and deny the instant motion to dismiss.

ARGUMENT

Twist will not belabor the points or repeat the arguments set forth more fully in his earlier October 24, 2005 Memorandum in Opposition to the prior Motion to Dismiss of Wausau filed on October 19, 2005, and instead, Twist incorporates by reference said Memorandum herein as if more fully set forth.

In his Second Amended Counterclaim, Cross-Claim and Third Party Claim Twist asserts Count II against Wausau pursuant to V.A.M.S. §379.200. The allegations of that Count II are the same as the allegations of Count II contained in the earlier Amended Counterclaim and Cross-Claims.

As noted in his prior Memorandum, Twist alleges that he has recovered a judgment in the amount of \$15,000,000.00 from Defendants Todd McFarlane Productions and Todd McFarlane on August 23, 2004 on his claim for violation of Twist's right of publicity. (Tony Twist's Second Amended Counterclaim, Crossclaims and Third Party Claims ¶¶ 53, 54) Twist also alleges that Wausau issued a Media Special Perils Policy to Image Comics, Inc. and that Todd McFarlane is an insured under the policy. (Tony Twist's Second Amended Counterclaim, Cross-claims and Third Party Claims ¶¶ 13). Twist expressly alleges that the Wausau policy provides coverage for the right of publicity claim of and judgment in favor of Tony Twist and the property damages he sustained and was awarded as a result thereof. (Tony Twist's Amended Counterclaim and Cross-claims ¶ 66). Thus, Twist has set forth the elements required by the statute to wit: a judgment for property damages, the existence of insurance agreement between the insurer, Travelers, and the defendants against whom a judgment was entered, and that such defendants were insured against such losses and damages.

In its memorandum submitted in connection with its prior motion to dismiss filed on October 19, 2005, Wausau contended that Twist's recovery was not a result of physical injury to or the destruction of tangible property. However, the statute does not state that there must be physical injury to or the destruction of tangible property and Wausau cites no case law or authority that the statute is so limited. There isn't any authority addressing the issue of whether the statute was intended to apply to tangible or intangible property rights or whether physical injury to property is required. The case of *State ex rel. Anderson v. Dinwiddie*, 359 Mo. 980, 224 S.W.2d 985 (1940) cited by Wausau in its prior Memorandum in support of the prior motion to dismiss, does not address the issue of property damage and therefore provides no support for Wausau's position.

In its prior memorandum in support of the Motion to Dismiss filed on October 19, 2005, Wausau also claimed that Twist sought compensation for a personal injury, specifically, a violation of his right to publicity. However, the Missouri Supreme Court indicated that the right of publicity is a property right and therefore violation of such right will result in damage to such property. *See Doe v. TCI Cablevision*, 110 S.W. 3d 363, 371 (Mo banc. 2003). *See also*, 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28:46 (4<sup>th</sup> ed.) and cases cited therein.

An action under V.A.M.S. §379.200 is an alternative to execution on a judgment or garnishment of a judgment debtor. The purpose of V.A.M.S. §379.200 "was to afford another remedy by which, with existing remedies, [insurance] funds, under all conditions, might be made available and subject to the payment of a [tort plaintiff's] judgment. *Linder v. Hawkeye-Security Ins. Co.*, 472 S.W.2d 412, 415 (Mo. banc. 1971) (*quoting Lajoie v. Central West Cas. Co.*, 228 Mo.App. 701, 71 S.W.2d 803, 812 (Mo.App. 1934)). *See, Schott v. Continental Auto Ins.*

*Underwriters*, 326 Mo. 92, 31 S.W.2d 7, 11 (Mo. 1930) "The remedy provided by the act is essentially that of a creditor's bill or equitable garnishment..." Thus, Twist is merely seeking to obtain payment of his judgment from the proceeds of the Traveler's policy as authorized by the statute.

Accordingly, Tony Twist's Second Amended Counterclaim, Cross-claims and Third Party Claims states a claim against Employers Mutual of Wausau under V.A.M.S. § 379.200 and therefore the Court should reconsider its prior order of January 24, 2006 and deny Wausau's Motion to Dismiss Count II of Tony Twist's Second Amended Counterclaim, Cross-claims and Third Party Claim.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of March, 2006, the foregoing was served by operation of the Court's electronic filing system and/or first class U.S. Mail, postage prepaid upon the following:

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